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No. _____

In The
Supreme Court Of The United States
October Term, 1996

STATE OF CONNECTICUT,
Respondent,

v.

DAVID SMITH,
Petitioner.

PETITION FOR WRIT OF CERTIORARI
TO THE APPELLATE COURT OF THE
STATE OF CONNECTICUT

PETITION FOR WRIT OF CERTIORARI (WITH ATTACHED APPENDICES)

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QUESTION PRESENTED FOR REVIEW

I. **Whether The Connecticut Appellate Court's Determination That A State Statute Which Imposes A Duty Upon Private Insurance Investigators To Disclose To Governmental Authorities All Relevant Material Acquired During Their Warrantless Search Of A Fire Scene Does Not Create An Agency Relationship By Operation Of Law And Therefore Does Not Require The Investigators To Obtain A Warrant Or Consent Violates The Fourth Amendment To The United States Constitution And Constitutes An Important Federal Constitutional Question Which Conflicts With Relevant Decisions Of This Court And Which Should Be Decided By This Court?**

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

STATE OF CONNECTICUT, Respondent

v.

DAVID SMITH, Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF CONNECTICUT

The Petitioner, David Smith, respectfully requests that this Court grant a writ of certiorari seeking review of the opinion of the Appellate Court of the State of Connecticut in *State v. Smith*, 40 Conn. App. 789, ___ A.2d ___ (April 2, 1996), *cert. denied*, 237 Conn. 915, ___ A.2d __ (May 28, 1996) (*see* Petitioner's Appendix at 1A-17A, hereinafter "Pet. App. at ___").

OPINION BELOW

The opinion of the Appellate Court of the State of Connecticut is reported at 40 Conn. App. 789, ___ A.2d ___ (April 2, 1996). It is reprinted in Petitioner's Appendix at 1A-16A. The Petitioner filed a Petition For Certification to the Connecticut Supreme Court which was denied and reported at 237 Conn. 915, ___ A.2d ___ (May 28, 1996). It is reprinted in Petitioner's Appendix at 17A.

JURISDICTION

The opinion of the Appellate Court of the State of Connecticut was reported on April 2, 1996. *See* Pet. App. at 2A. The Petitioner filed a Petition For Certification to the Connecticut Supreme Court on April 22, 1996. The Connecticut Supreme Court denied the Petition which was reported on May 28, 1996. *See* Pet. App. at 17A.

The Petitioner is relying upon Rules 10 *et seq.* of the Rules of the Supreme Court of the United States in filing this petition.

The jurisdiction of this Court is invoked under Title 28, United States Code, § 1254 ("Cases in the court of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree").

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment IV:

Searches and seizures

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Amendment XIV:

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Connecticut General Statutes Section 38a-318:

§ 38a-318. (Formerly Sec. 38-114h). Information to be furnished relative to fire losses. Limitation on liability. Confidentiality of information. Testimony concerning information given authorized agencies.

(a) Any authorized agency may in writing request any insurance company to release information relative to any investigation it has made concerning a loss or potential loss due to fire of suspicious or incendiary origin which shall include but not be limited to: (1) An insurance policy relative to such loss, (2) policy premium records, (3) history of previous claims, and (4) other relevant material relating to such loss or potential loss.

(b) If any insurance company has reason to suspect that a fire loss to its insured's real or personal property was caused by incendiary means, the company shall furnish any authorized agency with all relevant material acquired during its investigation of the fire loss, cooperate with and take such action as may be requested of it by the authorized agency and permit any person ordered by a court to inspect any of its records pertaining to the policy and the loss. Such insurance company may request any authorized agency to release information relative to any investigation it has made concerning any such fire loss of suspicious or incendiary origin.

(c) No insurance company, authorized agency or person who furnished information on behalf of such company or agency, shall be liable for damages in a civil action or subject to criminal prosecution for any oral or written statement made or any other action taken that is necessary to supply information requested pursuant to this section, unless there is fraud, actual malice or conduct relating to the release of such information which constitutes a criminal act.

(d) Except as provided in subsection (h) of this section, any authorized agency receiving any information furnished pursuant to this section shall hold the information in confidence until such time as its release is required pursuant to a criminal or civil proceeding.

(e) Any authorized agency personnel may be required to testify as to any information in the agency's possession regarding the fire loss of real or personal property in any civil action in which any person seeks recovery under a policy against an insurance company for the fire loss.

(f) For the purposes of this section, "authorized agency" means: (1) The state fire marshal or the local fire marshal when authorized or charged with the investigation of fires at the place where the fire actually took place; (2) the insurance commissioner.

(g) For the purposes of this section, "insurance company" shall include organizations issuing insurance policies in this state pursuant to the provisions of section 38a-328.

(h) Any authorized agency provided with information pursuant to subsection (a) or (b) of this section, may, in furtherance of its own purposes, release any information in its possession to any other authorized agency.

(i) The provisions of this section shall apply to fire losses occurring on or after October 1, 1979.

STATEMENT OF THE CASE

A. Introduction

This petition raises an important federal question as to whether a state statute which mandates insurance investigators to deliver the results of their criminal investigations to the state or local fire marshal creates an agency relationship thereby implicating the warrant requirement of the Fourth Amendment to the United States Constitution.

B. Facts Material To The Consideration Of The Question Presented.

The Petitioner was charged by substitute information with three counts of arson in the first degree and one count of conspiracy to commit arson. The charges arose from the destruction by fire of the Petitioner's business, a video rental store, and other commercial establishments located in a one-story mini mall in Terryville, Connecticut. *Smith*, 40 Conn. App. at 793 (Pet. App. at 5A). After the Petitioner consented to a search of his business premises by the state fire marshal's office, a two day investigation was conducted in order to determine the cause and origin of the fire. *Id.*

Following the completion of the investigation conducted by the state fire marshal's office, independent investigations were conducted by four private investigators on behalf the insurance companies which had insured the stores located in the mall. All four private investigators entered and inspected the premises of the Petitioner's business without obtaining his consent. *Id.*, at 794 (Pet.

App. at 6A). The private investigators took numerous photographs and videos, and in one case, removed samples from the Petitioner;s business premises for testing. *Id.* All four private investigators wrote reports and each one concluded that the fire originated in the Petitioner's store and that it was an act of arson.

Subsequently, the state fire marshal's office, in accordance with Section 38a-318 of the Connecticut General Statutes, requested copies of the investigative reports prepared by the private investigators on behalf of the insurance companies. *Smith*, at 794-5 (Pet. App. at 6A-7A). The insurance companies turned over the reports that they received from their respective investigators, with the exception of one insurance carrier.

C. Procedural History of the Case

It was the intention of the state to call each of the private insurance investigators and to elicit testimony from them which included the introduction of exhibits, photographs and videos. Pet. App. at 22A. Prior to trial, the Petitioner moved in limine to exclude the testimony of the private insurance investigators on the ground that their conduct constituted state action, and therefore, their search and seizure of evidence without obtaining a warrant or consent violated the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 7 of the Connecticut Constitution. *Smith*, at 791 (Pet. App. at 3A). After the trial court (Norko, J.) held a hearing on the Petitioner's motion, the court issued a memorandum of decision granting the motion in limine and excluding the testimony of the four private investigators as well as any

physical evidence seized by them from the Petitioner's premises. *Id. See also* Pet. App. at 18A-29A.

Following the trial court's decision, the state moved to dismiss the charges with prejudice pursuant to Conn. Gen. Stat. § 54-56 and requested permission to appeal pursuant to Conn. Gen. Stat. § 54-96. *Id.*, at 796 (Pet. App. at 8A). Over the Petitioner's objections, the trial court granted both of the state's oral motions. *Id.*

On appeal to the Appellate Court, the state claimed that the trial court improperly concluded (1) that an agency relationship arose by operation of law as a result of the reporting requirements of Section 38a-318; and, (2) that the facts support a finding of an agency relationship between state officials and the private insurance investigators. *Id.*, at 793 (Pet. App. at 5A).

The Appellate Court (Dupont, C.J., and O'Connell and Landau, Js.) heard oral argument on December 6, 1995 and issued its decision on April 2, 1996. *State v. Smith*, 40 Conn. App. 789, ___ A.2d ___ (1996); *see* Appendix at 1A. The Court reversed the judgment of the trial court, holding that (1) Section 38a-318 of the Connecticut General Statutes does not establish an agency relationship by operation of law between the private insurance investigators and the police; and, (2) the trial court's finding of an agency relationship between state officials and private citizens is not supported by the subsidiary facts. *Smith*, 40 Conn. App. at 799-804 (Pet. App. at 11A-16A).

The Petitioner filed a Petition For Certification to the Connecticut Supreme Court on April 22, 1996. The Connecticut Supreme Court denied the Petition which was reported on May 28, 1996. *See* Pet. App. at 17A.

REASON FOR GRANTING THE WRIT

I. Since The Connecticut Appellate Court's Determination That Section 38a-318 Of The Connecticut General Statutes Does Not Create An Agency Relationship By Operation Of Law Between Private Insurance Investigators And The State And Therefore Does Not Require The Investigators To Obtain A Warrant Or Consent Violates The Fourth Amendment To The United States Constitution Is An Important Federal Constitutional Question Which Conflicts With Applicable Decisions Of This Court, This Petition For A Writ Of Certiorari Should Be Granted.

A. Introduction

The Fourth Amendment to the United States Constitution, as made applicable to the states by the due process clause of the Fourteenth Amendment, prohibits unlawful searches and seizures by state officers. *New Jersey v. T.L.O.*, 469 U.S. 325, 333-34 (1985). *See also Coolidge v. New Hampshire*, 403 U.S. 443, 488 (1971).

The Fourth Amendment provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. This Court has stated that "[t]he basic purpose of this Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). As a general rule, "[w]hen the right of privacy must reasonably yield to the right of search, it is, . . ., to be decided by a judicial officer, not by a policeman or government enforcement agent." *Id.* at 529. Therefore, ". . . except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Id.*

Fourth Amendment constitutional guarantees against unreasonable searches and seizures generally apply only to governmental action and not to action by private citizens acting in their private capacity. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). However, "governmental action" is not limited to operations conducted by the police. *See New Jersey v. T.L.O.*, 469 U.S. at 335 (the Fourth Amendment is applicable to the activities of civil authorities such as building inspectors and fire persons). Thus, the acts of private citizens can become governmental action when they act as agents or instruments of the state. *See, e.g., Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989); *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971).

As noted by the Connecticut Supreme Court in *State v. Alexander*, 197 Conn. 180, 183-84, 496 A.2d 486 (1985), "[t]here is no bright line test for determining when a private citizen is acting as an agent of the police." *See also Thomas v. Cox*, 708 F.2d 132, 136 (4th Cir.), *cert. denied*, 104 S. Ct. 284 (1983).

The general test of whether a private citizen is acting as a governmental agent is "whether [the private citizen] in light of all the circumstances of the case, must be regarded as having acted as an 'instrument' or agent of the state." *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971). As noted by this Court in *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989), the fact that the Government has not compelled a private party to perform a search does not, by itself, establish that the search is a private one.

B. Section 38a-318 of the Connecticut General Statutes mandates insurance investigators to deliver the results of their criminal investigations to the state or local fire marshal, and as such, they are performing a function akin to governmental function such as criminal investigation so as to create an agency relationship.

In the present case, the private insurance investigators who searched the Petitioner's business premises and then turned the fruits of their search over to the police as mandated by state law were agents of the state, and as such, their entry onto the Petitioner's business premise without his consent constituted an illegal search under the federal constitution.

Section 38a-318(b) of the Connecticut General Statutes provides as follows:

> (b) If any insurance company has reason to suspect that a fire loss to its insured's real or personal

> property was caused by incendiary means, the company **shall** furnish any authorized agency with all relevant material acquired during its investigation of the fire loss, cooperate with and take such action as may be requested of it by the authorized agency and permit any person ordered by a court to inspect any of its records pertaining to the policy and the loss. Such insurance company may request any authorized agency to release information relative to any investigation it has made concerning any such fire loss of suspicious or incendiary origin.

Conn. Gen. Stat. § 38a-318(b) (emphasis added) (formerly Conn. Gen. Stat. § 38-114h).[1]

Thus, in this case, the four private insurance investigators were agents of the State of Connecticut by virtue of Conn. Gen. Stat. § 38a-318(b). This statute **mandates** private insurance investigators to furnish to the state or local fire marshal all relevant material acquired during its investigation if there is reason to believe the fire was intentionally set.[2] The requirement of Section 38a-

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[1] An "authorized agency" is defined as "[t]he state fire marshal or the local fire marshal when authorized or charged with the investigation of fires at the place where the fire actually took place...." Conn. Gen. Stat. § 38a-318(f).

[2] One of the basic tenets of statutory construction provides that where the meaning of a statute is plain and unambiguous, the enactment speaks for itself and there is no occasion to construe it. *See, e.g., Caminetti v. United States*, 242 U.S. 470, 485 (1917). Therefore, the use of the word 'shall' by the legislature connotes that

318(b) is not a matter of choice, nor is it required only upon request; rather, it imposes a duty upon the insurance companies and directs them to turn over the results of their "criminal" investigation. When an insurance company sends an investigator to a scene of a fire loss, it is the investigator's task to determine the cause and origin of the fire -- in other words -- to determine if it was a set fire or an accidental fire, the same task as that of the fire marshal.[3] By affirmatively requiring and directing

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the performance of the statutory requirements is mandatory rather than permissive. Additionally, the legislative history supports the position that the use of the word "shall" imposed a mandatory duty upon insurance companies to turn over materials in those cases of fire loss that are determined to be arson is supported by the legislative history. For example, during the discussion in the House of Representatives prior to passing this law, a legislator explained that:

> This bill seeks to correct the deficiency in the present system in fire investigations by requiring insurance companies to report to the State fire marshalls [sic] any information relating to fire that companies believe to be of suspicious origin....

Remarks of Representative Bordiere (24th District) on H.B. 6613, "An Act Requiring Insurance Companies To Furnish Fire Officials With Information Relating To Losses", Proceedings of the House of Representatives, April 27, 1977, at 1456.

[3] In fact, the legislative history of Conn. Gen. Stat. § 38a-318 (Public Act 77-139, House Bill 6613) shows that the intent in enacting this provision was for law enforcement and private insurance investigators to work in conjunction with each other so that a greater number of arson cases would be solved. *See* Remarks Ralph J. Marone before the 1977 Joint Standing Committee On Insurance and Real Estate, March 9, 1977, at 487; Remarks of

insurance investigators to deliver the results of their criminal investigations to the state or local fire marshal, they are performing a function akin to governmental function such as criminal investigation so as to create an agency relationship.

C. The Appellate Court's Determination That Section 38a-318 Of The Connecticut General Statutes Does Not Establish An Agency Relationship By Operation Of Law Between The Private Insurance Investigators And The State Is In Error.

In the instant case, the trial court determined that the private insurance investigators were agents of the state based upon the following findings:

(1) the policy of turning over the insurance reports is statutorily authorized and that the insurance company is mandatorily required to turn the reports over;

(2) it is logical that the State Police would want to see the reports rendered by the private investigators and would monitor whether there were investigators on the scene and would professionally request the reports to round out their own investigation; and,

(3) Conn. Gen. Stat. § 38a-318 is a statute legislatively enacted with its intended consequences.

Representative Bordiere (24th District) on H.B. 6613, "An Act Requiring Insurance Companies To Furnish Fire Officials With Information Relating To Losses", Proceedings of the House of Representatives, April 27, 1977, at 1455-56.

See Pet. App. at 27A-28A. The Connecticut Appellate Court rejected the trial court's analysis and concluded that an agency relationship can arise by operation of law if a statute creates the relationship, but it held that the controlling test for determining whether Section 38a-318 establishes an agency relationship is the existence of the following three elements: (1) there is a manifestation by a principal that a person is acting for that principal; (2) there is acceptance by an agent of the relationship; and, (3) there is an understanding that the principal is in control of the acts of the agent. *See Smith*, 40 Conn. App. at 799 (*citing Gateway Co. v. DiNoia*, 232 Conn. 223, 240, 654 A.2d 342 (1995)). The Appellate Court's reliance upon the criteria enunciated in *Gateway* is misplaced and ignores established federal precedent used to define the agency relationship in connection with the circumstances in the present case, that is, determining when a private citizen is acting as an agent of the state.

First, the criteria used in *Gateway* is not necessarily determinative of the issue in the present case. In *Gateway*, an action to recover damages for breach of a lease agreement, the plaintiffs attempted to establish an agency relationship between two of the defendants so that the principal would be held liable for acts of his agent. *See Gateway Co. v. DiNoia*, 232 Conn. at 240. However, in the present case, the issue is whether the private insurance investigators were acting as agents of the state in conducting their investigation. In examining under what circumstances a private citizen acts as an agent of the police, federal courts have employed criteria that is different than the criteria used in the civil context of agency law. *See Coolidge v. New Hampshire*, 403 U.S.

443, 487 (1971); *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989).

The Connecticut Appellate Court determined that "[s]tate action can exist by legislative fiat only when the legislation confers private parties a power that traditionally belongs to the government and grants coercive power or provides significant overt or covert encouragement to private parties to engage in a particular act." *Smith*, 40 Conn. App. at 800. The Court concluded that in this case, Section 38a-318 falls short of this requirement. However, the Court ignored the statutory provision of subsection (c) of Section 38a-318 which grants to private insurance companies qualified immunity from civil or criminal prosecution for any oral or written statement made or any other action taken by such companies that is necessary to supply information requested by Connecticut General Statute §38a-318. The clear import of Connecticut General Statute §38a-318(c) is to significantly encourage private insurance companies to collect evidence concerning suspicious or incendiary fires and to disclose such information to the state fire marshal's office by granting to the companies qualified immunity not only from civil actions but also from criminal prosecution.[4]

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[4] Thus, as was the case here, when an insurance company, acting through its agents, trespass upon an insured's property in order to gather evidence of a suspicious or incendiary fire, the insurance company and its agents are protected from prosecution for crimes such as trespass, *see* Conn. Gen. Stat. §§ 53a-107 *et seq.*, unless there is fraud, actual malice or conduct relating to the release of such information which constitutes a criminal act. Therefore, when the state supports and encourages the actions of private parties to discover evidence or criminal conduct, the activities of those

Furthermore, the fact that the state has not compelled the insurance investigator to perform a search does not establish that the search is a private one. *See Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 109 S. Ct. 1402, 1411 (1989). *Skinner* involved the application of two Federal Railroad Administration regulations. One set of the regulations authorized -- but did not require -- railroads to administer breath and urine tests to covered employees who violate certain safety rules. This Court held that these regulations were controlled by the Fourth Amendment because "[t]he Government did more than adopt a passive position toward the underlying private conduct." One of the purposes served by the regulation was to confer a right upon the Federal Railroad Administration to receive test results. *See Skinner*, 109 S. Ct. at 1411-12.

Likewise, in the instant case, the State does more than adopt "a passive position" toward the investigation of suspected incendiary fires. It grants the State and local fire marshals the right to receive the fruits of the insurance investigation, it directs insurance companies to disclose the results and it grants the companies limited immunity upon such disclosure. *See* Conn. Gen. Stat. § 38a-318(c). Thus, by operation of state statute, insurance investigators are agents of the State, and as such, their warrantless entry onto the Petitioner's business premises without his consent constituted an illegal search under the Fourth Amendment

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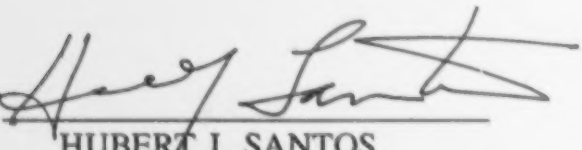
private parties constitutes state action. In fact, the legislative history of Conn. Gen. Stat. § 38a-318 (Public Act 77-139, House Bill 6613) shows that the intent in enacting this provision was for law enforcement and private insurance investigators to work in conjunction with each other so that a greater number of arson cases would be solved.

to the United States Constitution. Accordingly, because the Connecticut Appellate Court's decision constitutes an important federal constitutional question and it conflicts with relevant decisions of this Court, the Petition For A Writ Of Certiorari should be granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Appellate Court for the State of Connecticut should be granted.

THE PETITIONER,

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APPENDIX

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Opinion of the Appellate Court of the
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Denial By The Connecticut Supreme Court
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Connecticut Appellate Court,
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Trial Court's Memorandum Of Decision
Re: Motion In Limine To Exclude
Testimony,
January 13, 1996 . . . . . 18A-29A

STATE OF CONNECTICUT *v.* DAVID SMITH (14454)

Dupont, C. J., and O'Connell and Landau, Js.

The state, with the permission of the trial court, appealed to this court from the judgment of the trial court dismissing with prejudice the charges of arson in the first degree and conspiracy to commit arson in the first degree that had been filed against the defendant. That court had granted the defendant's motion in limine to exclude testimony of the insurance investigators who had investigated the cause of the fire that had

destroyed the defendant's business premises. *Held* that the trial court improperly determined that the private investigators who had conducted investigations on behalf of the insurance companies were agents of the state and that their entry onto the defendant's premises without a search warrant and without the defendant's consent constituted an illegal search; an agency relationship did not arise by operation of law based on the statute (§ 38a-318) permitting the state fire marshal to request and receive relevant material acquired by private investigators in the course of investigating a fire of suspicious or incendiary origin because that statute does not provide that the state exercise any degree of control over the investigators, and that court's finding that an agency relationship existed in fact was not supported by the evidence.

Argued December 6, 1995—decision released April 2, 1996

Substitute information charging the defendant with three counts of the crime of arson in the first degree and with the crime of conspiracy to commit arson in the first degree, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford, where the court, *Norko, J.*, granted the defendant's motion to exclude certain evidence; thereafter, the court granted the state's motion to dismiss the information, and rendered judgment thereon, from which the state, on the granting of permission, appealed to this court. *Reversed; further proceedings.*

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *James E. Thomas*, state's attorney, and *Joan E. Alexander* and *Edward R. Narus*, assistant state's attorneys, for the appellant (state).

Hope C. Seeley, with whom, on the brief, was *Hubert J. Santos*, for the appellee (defendant).

DUPONT, C. J. The state, with the permission of the trial court pursuant to General Statutes § 54-96,[1] appeals from the trial court's judgment dismissing with preju-

[1] General Statutes § 54-96 provides: "Appeals from the rulings and decisions of the superior court, upon all questions of law arising on the trial of criminal cases, may be taken by the state, with the permission of the presiding judge, to the supreme court or to the appellate court, in the same manner and to the same effect as if made by the accused."

dice three counts of arson in the first degree in violation of General Statutes §§ 53a-111 and 53a-8 and one count of conspiracy to commit arson in the first degree in violation of General Statutes §§ 53a-48 and 53a-111.

Prior to the dismissal, the trial court granted the defendant's "motion in limine to exclude testimony" of the private insurance investigators who had conducted a cause and origin investigation of the fire that had destroyed the defendant's business premises. Although the defendant's motion referred to "testimony," the trial court's decision limited the scope of the suppression to "any/all testimony, photographs, tests and/or videos of the defendants premises. All photographs, or videos or tests of the exterior of the mall or general areas such as roof and the other business premises are not suppressed. All conclusions of the investigators as to cause and origin of the fire that are based upon information, photographs, videos or tests from the business premises of the defendant are suppressed."

The sole issue in this appeal is whether the trial court properly held that the entry by private insurance investigators onto the defendant's business premises, without a search warrant and allegedly without his consent,[2] violated his constitutional rights. Contrary to the trial court's decision, we conclude that under the circumstances of this case, the private investigators who conducted cause and origin investigations on behalf of the insurance companies involved were not agents of the

[2] The state also argued on appeal that the trial court committed plain error by the suppression of the report of the investigator for the defendant's insurance company. The state claimed that the defendant, by virtue of his insurance contract with the company, had consented to an inspection of his burned-out premises. In view of our holding that the insurance investigators were not agents of the state, we need not reach this issue. We also do not reach the issue, raised by the state to the trial court, of whether the defendant had also consented to the search by the investigator working for the defendant's lessor's insurer, by virtue of the defendant's lease with the lessor.

state, and, as such, their entry onto the defendant's business premises did not constitute an illegal search under the fourth amendment to the United States constitution and article first, § 7, of the constitution of Connecticut.[3] We, therefore, reverse the judgment of the trial court.

The fourth amendment[4] protects persons from unreasonable searches and seizures by the federal government; *Coolidge* v. *New Hampshire*, 403 U.S. 443, 488, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971); and is made applicable to state action by the fourteenth amendment. *Camara* v. *Municipal Court of San Francisco*, 387 U.S. 523, 528, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967). Fourth amendment constitutional guarantees against unreasonable searches and seizures apply, however, only to governmental action and do not apply to action by private citizens acting in their private capacity. *Burdeau* v. *McDowell*, 256 U.S. 465, 475, 41 S. Ct. 574, 65 L. Ed. 1048 (1921). "[A] wrongful search or seizure conducted by a private party does not violate the Fourth Amendment and . . . such private wrongdoing does not deprive the government of the right to use evidence that it has acquired lawfully." *Walter* v. *United States*, 447 U.S. 649, 656, 100 S. Ct. 2395, 65 L. Ed. 2d 410 (1980). An exception, however, to the general rule that the fourth amendment does not protect against searches by private persons is that the fourth amendment may be invoked where a private person, in light

[3] The defendant, the state and the trial court in its memorandum of decision do not rely on the Connecticut constitution for any analysis. We, therefore, limit our discussion of this matter to the federal guarantee. See *State* v. *Joly*, 219 Conn. 234, 258 n.16, 593 A.2d 96 (1991).

[4] The fourth amendment to the United States constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

of all circumstances of the case, is acting as the agent or instrument of the state. *Coolidge* v. *New Hampshire*, supra, 403 U.S. 487.

The state claims that the trial court improperly concluded (1) that an agency relationship arose by operation of law as a result of the reporting requirements of General Statutes § 38a-318, and (2) that the facts support a finding of an agency relationship between state officials and the private insurance investigators.[5]

To address the state's claims, we must first discuss the procedural history and the facts of this case. On April 27, 1991, Video Galaxy, a video rental store owned by the defendant, and other commercial establishments located in a one story mini mall structure known as Waz's Plaza, were destroyed by fire. Due to the nature of the fire, members of the state fire marshal's office were assigned to investigate the cause and origin of the fire. The defendant and the owners of the other commercial establishments affected by the fire consented to a search of their business premises by the state fire marshal's office and members of that office conducted an investigation from April 27 through April 29, 1991.

Subsequent to the investigation, many of the insurance companies that insured the commercial establishments at Waz's Plaza contracted with or assigned private investigators to investigate the origin and cause of the fire. The reports of the private investigators revealed that each of the investigators went to the fire scene and inspected not only the commercial establishments that were insured by each investigator's respective insurance employer, but also the other commercial

[5] The defendant states the issues as follows: (1) whether the trial court's determination of agency was legally and logically correct, and (2) whether the trial court's finding that an agency relationship existed was clearly erroneous.

establishments located at Waz's Plaza, including that of the defendant. The reports also reveal that the investigators took numerous photographs and videos and, in one case, removed samples from the defendant's premises for testing. None of the reports, however, indicates that any of the investigators asked for permission from the defendant to enter his premises.

On May 28, 1991, the state fire marshal's office issued its report on the origin and cause of the fire and concluded that the fire originated on the defendant's premises and was caused by arson. The trial court found that none of that report's conclusions or findings of fact came from the reports of the private investigators.[6] The trial court also found that the reports of the investigators were not prepared on behalf of the government and that there was no intent on the part of the investigators to engage in a search or seizure.

Some time after it had issued its report, the state fire marshal's office, in accordance with General Statutes § 38a-318,[7] requested copies of the investigative reports

[6] The trial court noted that the state fire marshal's report contained information from one of the private investigators, Thomas Haynes, concerning his electrical inspection of Video Galaxy. The trial court concluded, however, that that information was cumulative and came from conversation, not from the report prepared by Haynes.

[7] General Statutes § 38a-318 provides in relevant part: "Sec. 38a-318. (Formerly Sec. 38-114h). Information to be furnished relative to fire losses. Limitation on liability. Confidentiality of information. Testimony concerning information given authorized agencies. (a) Any authorized agency may in writing request any insurance company to release information relative to any investigation it has made concerning a loss or potential loss due to fire of suspicious or incendiary origin which shall include but not be limited to: (1) An insurance policy relative to such loss, (2) policy premium records, (3) history of previous claims, and (4) other relevant material relating to such loss or potential loss.

"(b) If any insurance company has reason to suspect that a fire loss to its insured's real or personal property was caused by incendiary means, the company shall furnish any authorized agency with all relevant material acquired during its investigation of the fire loss, cooperate with and take such action as may be requested of it by the authorized agency and permit

prepared by the private investigators on behalf of the insurance companies. The insurance companies turned over the reports that they had received from their respective investigators, with the exception of the report prepared by Thomas Haynes for the defendant's insurance carrier.[8]

The defendant claims that the actions of the private investigators who entered the defendant's business premises constituted state action conducted without the consent of the defendant and without search warrants. The defendant argues, therefore, that the entry and gathering of evidence constituted an illegal search and seizure in violation of the fourth and fourteenth amendments to the United States constitution.

The trial court conducted a hearing on the defendant's motion. The defendant presented the testimony of Detective Julio Fernandez and Sergeant James But-

any person ordered by a court to inspect any of its records pertaining to the policy and the loss. Such insurance company may request any authorized agency to release information relative to any investigation it has made concerning any such fire loss of suspicious or incendiary origin.

"(c) No insurance company, authorized agency or person who furnished information on behalf of such company or agency, shall be liable for damages in a civil action or subject to criminal prosecution for any oral or written statement made or any other action taken that is necessary to supply information requested pursuant to this section, unless there is fraud, actual malice or conduct relating to the release of such information which constitutes a criminal act.

* * *

"(f) For the purposes of this section, 'authorized agency' means: (1) The state fire marshal or the local fire marshal when authorized or charged with the investigation of fires at the place where the fire actually took place; (2) the insurance commissioner. . . ."

[8] The state fire marshal's office was aware that Haynes had prepared a written report and that he had submitted the report to the defendant's insurance carrier, but, according to Sergeant James Butterworth of the state fire marshal's office, the defendant's insurance carrier refused to turn over its report to the state because it claimed that it had not requested Haynes to prepare a report. Thus, the state never received Haynes' report under the auspices of § 38a-318.

terworth of the state fire marshal's office and that of Haynes. Additionally, the following documents were admitted as court exhibits: (1) the state fire marshal's report and its formal request for information addressed to the defendant's insurance carrier; (2) the letter sent by the state fire marshal to the defendant's insurance carrier requesting materials; (3) the reports prepared by each of the private investigators; (4) Haynes' file and notes; and (5) the lease between the defendant and his lessor, Plymouth Commons Realty Corporation.

The trial court, in a written memorandum of decision, concluded that "the private investigators are agents of the state of Connecticut and as such their entry onto the defendant's business premises without his consent constituted an illegal search under the fourth amendment to the United States constitution and article first, § 7, of the Connecticut constitution." Following the trial court's decision to grant the motion in limine and to suppress the evidence compiled by the private investigators, the state moved to dismiss the charges with prejudice pursuant to General Statutes § 54-56,[9] and moved for permission to appeal pursuant to General Statutes § 54-96. Over the defendant's objections, the trial court granted both of the state's oral motions. This appeal followed.

The trial court based its finding of an agency relationship on the ramifications of § 38a-318 and *State* v. *Zar-*

[9] General Statutes § 54-56 provides: "All courts having jurisdiction of criminal cases shall at all times have jurisdiction and control over informations and criminal cases pending therein and may, at any time, *upon motion by the defendant*, dismiss any information and order such defendant discharged if, in the opinion of the court, there is not sufficient evidence or cause to justify the bringing or continuing of such information or the placing of the person accused therein on trial." (Emphasis added.) We note that this statute authorizes a trial court to dismiss charges upon motion of the defendant. Even though it was the state that moved to dismiss the charges with prejudice, the trial court had authority to grant that motion. *State* v. *Ross*, 189 Conn. 42, 454 A.2d 266 (1983).

ick, 227 Conn. 207, 630 A.2d 565, cert. denied, U.S. , 114 S. Ct. 637, 126 L. Ed. 2d 595 (1993). In *Zarick*, the defendant claimed that certain photographs given to police in Massachusetts by a commercial film developing laboratory to which the film had been sent by the defendant were illegally seized because the film developing laboratory was an agent of the state. The Supreme Court affirmed the trial court's finding that the film developing laboratory was not an agent of the state and that the photographs did not improperly come into the possession of the Massachusetts police. *State* v. *Zarick*, supra, 227 Conn. 228.

As noted by the trial court in the present case, the evidence in *Zarick* that served to support the trial court's finding that there was no agency included the facts that (1) the policy of turning over questionable photographs to the police was initiated by the film developing company, (2) the decision to turn over specific photographs was entirely up to the company, (3) there was no supervision or random checking of the company by the police in connection with this policy, and (4) there were no instructions or rules regarding such policy promulgated by the police.

Relying on *Zarick*, the trial court concluded "that the policy of turning over the insurance reports is statutorily authorized and that the insurance company is mandatorily required to turn the reports over; that it is logical that the state police would want to see the reports rendered by the private investigators and would monitor whether there were investigators on the scene and would professionally request the reports to round out their own investigation; and that [General Statutes] § 38a-318 is a statute legislatively enacted with its intended consequences."[10]

[10] The trial court heard testimony from Butterworth that it is a standard practice for the state fire marshal's office to write to insurance companies in order to get their reports of fire scene investigations and that if a case

None of the Connecticut cases involving the question of the existence of an agency relationship between a private person and the state in determining whether the fourth amendment prohibitions apply to the behavior of a private person involves a statute. It is also a case of first impression as to whether § 38a-318 creates an agency relationship between the state and insurance companies.

I

AGENCY BY OPERATION OF LAW

The state's first claim is that the trial court should not have concluded that an agency relationship arose as a matter of law by operation of the reporting requirements of § 38a-318.[11]

The state argues that the trial court's decision focuses on the reporting requirements of § 38a-318 and the fact that state fire officials requested and received copies of the reports of the private investigators pursuant to statute. The state, therefore, asserts in its brief that the trial court determined that the agency relationship arose by operation of law based on the reporting requirements of § 38a-318.

An agency relationship can arise by operation of law if a statute, rather than a contract or acts of the parties, creates the relationship. See Ballentine's Law Dictionary (3d Ed. 1969). The question that we must resolve is whether § 38a-318 creates an agency relationship between the insurance investigators and the police or fire marshal. Although agency is ordinarily a question of fact, it becomes a matter of law when a statute

is going to proceed to arrest, these reports, as a matter of policy, are incorporated as part of the state fire marshal's file, and are then submitted to the state's attorney's office.

[11] The trial court did not explicitly conclude that an agency relationship existed because § 38a-318 created such a relationship, but did primarily rely on the statute to conclude that the investigators were agents of the state.

permits a finding of the relationship. *Gordon* v. *Bridgeport Housing Authority*, 208 Conn. 161, 184–85, 544 A.2d 1185 (1988).

An agency relationship exists if (1) there is a manifestation by a principal that a person is acting for that principal, (2) there is acceptance by an agent of the relationship, and (3) there is an understanding that the principal is in control of the acts of the agent. *Gateway Co.* v. *DiNoia*, 232 Conn. 223, 240, 654 A.2d 342 (1995); *Hall* v. *Peacock Fixture & Electric Co.*, 193 Conn. 290, 294, 474 A.2d 1100 (1984). If § 38a-318 establishes each of these elements of agency, an agency relationship exists by operaton of law. *Gordon* v. *Bridgeport Housing Authority*, supra, 208 Conn. 184–85. We must, therefore, review the statute to determine if it establishes an agency relationship between the state and private insurance investigators, thus implicating the fourth amendment.

The language of § 38a-318 does not require private insurance investigators to act for the state or to conduct an investigation in any particular way, or require insurance carriers to initiate a report for every fire for which a claim is made or to initiate a report whenever they deem that they may not be liable to a policy holder because arson may be involved. There is also no indication in the statute that private insurance investigators have accepted such an undertaking. Lastly, the statute does not provide or even allude to any understanding between the state and private insurance investigators that the state would exercise any degree of control over private insurance investigators in their execution of cause and origin inspections. Although § 38a-318 permits the state fire marshal to request and to receive relevant material acquired by private insurance investigators when investigating a loss due to a fire of suspicious or incendiary origin, it does not coerce or require the investigators to take any particular action.

State action can exist by legislative fiat only when the legislation confers on private parties a power that traditionally belongs to the government and grants coercive power or provides significant overt or covert encouragement to private parties to engage in a particular act. *San Francisco Arts & Athletics* v. *U.S.O.C.*, 483 U.S. 522, 542, 113 S. Ct. 1799, 123 L. Ed. 2d 554 (1986); *Alliance for Community Media* v. *Federal Communications Commissions*, 56 F.3d 105, 116 (D.C. Cir. 1995). We conclude that § 38a-318 falls far short of establishing an agency relationship by operation of law.

II

AGENCY AS A QUESTION OF FACT

Because we have concluded that the statutory scheme of § 38a-318 does not establish an agency relationship, we must next resolve whether that relationship is established in light of all of the factors in the case, including the factor of the action required of insurance companies by the statute. See *Connecticut Air Service, Inc.* v. *Danbury Aviation Commission*, 211 Conn. 690, 561 A.2d 120 (1989). The state claims that the trial court's finding of an agency relationship between state officials and private citizens is not supported by the subsidiary facts.

"A factual finding may be rejected by this court only if it is 'clearly erroneous.' " *Kaplan* v. *Kaplan*, 186 Conn. 387, 392, 411 A.2d 629 (1982), quoting Practice Book § 3060D (now § 4061). Practice Book § 4061 provides that we may reverse or modify the decision of the trial court if we determine "that the factual findings are clearly erroneous in view of the evidence and pleadings in the whole record, or that the decision is otherwise erroneous in law." To test whether a finding is clearly erroneous, we determine whether there is evidence to support the finding. If there is not, the finding is clearly erroneous. *Metropolitan District* v. *Housing Author-*

ity, 12 Conn. App. 499, 510–11, 531 A.2d 194, cert. denied, 205 Conn. 814, 533 A.2d 568 (1987). If the trial court's conclusions or findings of fact rest on speculation rather than on sufficient evidence, they are clearly erroneous. *Williams* v. *Campanaro Construction Co.*, 20 Conn. App. 709, 711–13, 570 A.2d 228 (1990).

The ultimate finding that an agency exists usually turns on factual questions, which, in the context of a motion to suppress, where the claim is that a private individual is acting for the state, requires scrupulous appellate examination of the record to determine whether that factual finding is supported by substantial evidence. *State* v. *Alexander*, 197 Conn. 180, 185, 496 A.2d 486 (1985). We must review the facts found on a clearly erroneous standard and then review de novo the court's ultimate application of the law to those facts. *United States* v. *Garlock*, 19 F.3d 441, 442 (8th Cir. 1994).

As noted by our Supreme Court, "[t]here is no bright line test for determining when a private citizen is acting as an agent of the police." *State* v. *Alexander*, supra, 197 Conn. 183, citing *Thomas* v. *Cox*, 708 F.2d 132, 136 (4th Cir.), cert. denied, 464 U.S. 918, 104 S. Ct. 284, 78 L. Ed. 2d 262 (1983). We must determine whether, in light of all the circumstances, the private insurance investigators acted as an instrument or agent of the state. See *Skinner* v. *Railway Labor Executives' Assn.*, 489 U.S. 602, 614, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989), quoting *Coolidge* v. *New Hampshire*, supra, 403 U.S. 487. In making this determination, "we consider whether private citizens are performing a function akin to a governmental function such as criminal investigation and whether they are acting on the order, instruction, or request of a government officer." *State* v. *Lee*, 32 Conn. App. 93, 84, 628 A.2d 1318, cert. denied, 227 Conn. 924, 632 A.2d 702 (1993), cert. denied, U.S. , 114 S. Ct. 1319, 127 L. Ed. 2d 668 (1994).

Some of the factors that determine whether an agency has been created have been delineated by both federal and state decisions. These considerations include the subsidiary facts of who or what initiated the action by the private individual, who decides whether the fruit of the action is to be given to the state, who determined the way in which the action was to be conducted; *United States* v. *Garlock*, supra, 19 F.3d 443–444; *State* v. *Zarick*, supra, 227 Conn. 227–28; the extent of the contact between the state and the individual and whether the individual receives a monetary or other form of inducement from the government; *State* v. *Alexander*, supra, 197 Conn. 187; whether the government had prior knowledge that the individual would act as she or he did; *Burdeau* v. *McDowell*, supra, 256 U.S. 475; whether the primary purpose of the state and the actor was the same; *California* v. *Mangiefico*, 25 Cal. App. 3d 1041, 1048, 102 Cal. Rptr. 449 (1972); whether a statute mandates the private action; *Skinner* v. *Railway Labor Executives' Assn.*, supra, 489 U.S. 614–15; whether the purpose of the individual was to benefit the government; *United States* v. *Attson*, 900 F.2d 1427, 1432–33 (9th Cir.), cert. denied, 498 U.S. 961, 111 S. Ct. 393, 112 L. Ed. 2d 403 (1990); whether the government's role was active or passive; *Skinner* v. *Railway Labor Executives' Assn.*, supra, 615; whether the government exercised coercive means and whether the act involved a power that was the exclusive prerogative of the government; *United States* v. *Garlock*, supra, 19 F.3d 443–44; and whether at the time of the act the private citizen was engaged in assisting the government in its public purpose. *United States* v. *McAllister*, 18 F.3d 1412, 1418 (7th Cir. 1994). All of these factors relate to the three ingredients of agency, namely, whether there is a manifestation by the principal-government that the agent-individual is acting for the government, whether the agent-individual has accepted the relationship and

whether the principal-government and the agent-individual understand that the government is in control of the acts of the individual.

The record here is devoid of any evidence that shows that the state coerced, encouraged, suggested or initiated the cause and origin inspections performed by the private insurance investigators. To the contrary, the trial court found that the private insurance investigators' investigations were conducted at the behest of insurance companies that insured the commercial establishments at Waz's Plaza. There is also no evidence that the government exercised any degree of control over the private insurance investigators when they conducted their inspections. The fact that the state fire marshal's office and the private insurance investigators were all engaged in cause and origin investigations does not create the required nexus to establish that the private insurance investigators "acted as . . . instrument[s] or agent[s] of the Government." *Skinner* v. *Railway Labor Executives' Assn.*, supra, 489 U.S. 614.

In this case, the purpose of the state was to determine if there was sufficient evidence for criminal prosecution, and the purpose of the private insurance companies, through their investigators, was primarily to determine the liability of their companies for insurance claims. Included in the latter determination are subsidiary determinations of whether there was arson by someone other than their policyholders, and whether there might be rights of subrogation. Insurance companies also have the purpose of gathering information useful in the future investigation of other fires. The purposes of the state and the private insurance investigators were, therefore, different because the insurance investigators had a legitimate independent motive to investigate. Although § 38a-318 may require insurance companies to turn over their investigative reports to

the state, the statute does not mandate that there be any investigation conducted at all. Cf. *Skinner* v. *Railway Labor Executives' Assn.*, supra, 489 U.S. 614–15.

The trial court found that the policy of turning over the insurance reports was authorized by statute and that the requirement of providing them to the state was mandated by the statute. As previously discussed, although those findings are not erroneous, the ultimate finding that an agency relationship therefore arose cannot be supported by those facts. The trial court also rested its conclusion of agency on its finding that it is logical that the state police would want to see the reports and would monitor whether there were investigators on the scene and would request the reports to round out the police investigations. There is no evidence to support whether the state police "would monitor whether there were investigators on the scene." Although there was evidence that it is standard practice for the state fire marshal's office to obtain insurance reports, and that, if an arrest resulted from the state's investigation, the insurance reports would be provided to the state's attorney's office, neither of those practices relates to whether an agency relationship existed at the time the insurance reports were made or at the time the private investigations occurred.

We conclude that the entry onto the defendant's business premises was private in nature and was not attributable to the state. Therefore, fourth amendment constitutional guarantees do not apply.

The judgment is reversed and the case is remanded with direction to reinstate the case on the docket of the court and to deny the motion in limine.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* DAVID SMITH

The defendant's petition for certification for appeal from the Appellate Court, 40 Conn. App. 789 (AC 14454), is denied.

Hope C. Seeley and *Hubert J. Santos*, in support of the petition.

Timothy J. Sugrue, executive assistant state's attorney, in opposition.

NO. CR91 74897

STATE OF CONNECTICUT		SUPERIOR COURT
VS.	:	J.D. OF HARTFORD/NEW BRITAIN AT HARTFORD
DAVID SMITH	:	JANUARY 13, 1995

MEMORANDUM OF DECISION
RE: MOTION IN LIMINE
TO EXCLUDE TESTIMONY

The defendant David Smith was the owner of a video tape store called the Video Galaxy located in a "strip mail" with eight other business establishments in Terryville, Connecticut. On April 27, 1991 the Video Galaxy Business and other stores were destroyed by fire. As a result of that fire the defendant has been charged with Arson 1st and three other counts.

Due to the nature of the fire the State Fire Marshall's office was brought in to investigate the cause and origin of the fire. The State Police and its agents intensely investigated the scene of the fire from the 27th of April until the 29th of April 1991. While on the premises the State Police sought and received permission to investigate the premises of the defendant and the other stores affected by the fire.

Subsequent to the state police investigation many of the insurance companies who insured the various stores in the mall contracted or assigned private investigators to investigate the origin and cause of the fire. The following investigators investigated the scene of the fire and each rendered reports to the requesting insurance company:

Thomas Haynes (Dee Insurance Investigations)
Gary P. Pease (GNP Investigative Service)
Herbert K. Johnson (Arson-Fire Consultants)

Leo Czajkowlski (INS Investigative Bureau)

In reviewing the reports of the private investigators they show that each of them went to the fire scene and not only inspected the premises of the business that was insured by their employer but basically entered the premises of the entire mall including the premises of the accused. In viewing their reports it shows that they took extensive pictures, videos and in one case removed samples for testing from the defendants' business premises. Each of the reports come to a conclusion based upon an analysis of the entire mall both externally and internally. In reviewing the reports submitted to the court in the hearing on the motion, none of them indicate that any of the investigators asked for permission from the defendant to enter his business premise known as Video Galaxy.

On May 28, 1991 the State Police rendered its report and their conclusions as to the origin and cause of the fire. After reviewing the report this court finds that none of the conclusions or findings of fact are from any of the reports of the private investigators. There is some information from Thomas Haynes concerning his electrical inspection of the Video Galaxy but that information is cumulative and comes from an oral conversation and not the report rendered by Haynes. Some time later the State Fire Marshal's office in accordance with Conn. Gen. Stat. §38a-318 (formerly Sec. 38-114h) requested copies of the investigative reports from each of the insurance companies. Conn. Gen. Stat. §38a-118 states:

> (a) Any authorized agency may in writing request any insurance company to release information relative to any investigation it has made to any investigation it has made concerning a loss or potential loss due to fir of suspicions or incendiary

> origin which shall include but not limited to:(1) an Insurance policy relative to such loss, (2) policy premium records, (3) history of previous claims, and (4) other relevant material relating to such loss or potential loss.

The statute goes on to protect the insurance company from liability for any of the information turned over to the governmental agency.

It is the intention of the State to call each of the private investigators and to elicit testimony from them which includes testimony, exhibits, photographs and video's. It is the position of the defendant/owner of the Video Galaxy that this court should suppress all evidence of the private insurance investigators because they are in effect agents of the state and as such they did not secure the permission of the owner to search his business premises.

The Fourth Amendment to the United States Constitution provides that, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[1] The United States Supreme Court has stated that "[t]he basic purpose of this Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Camara v.

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[1] Likewise, Article I, Section 7 of the Connecticut Constitution provides "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."

Municipal Court, 387 U.S. 523, 528 (1967). As a general rule, "[w]hen the right of privacy must reasonably yield to the right of search, it is,..., to be decided by a judicial officer, not by a policeman or government enforcement agent." Id. at 529. Therefore, "...except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."[2]

The United States Supreme Court long has recognized that warrantless searches are generally unreasonable, and that this rule applies to commercial premises as well as homes. In See v. City of Seattle, 387 U.S. 541 (1967), the Court ruled:

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[2] Under such circumstances, the state bears the burden of proving that an exception to the warrant requirement exists. See State v. Vargas, 34 Conn. App. 492, 496, __A.2d__ (1994).

> The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant.

Id. at 543. Thus, a businessman has an expectation of privacy in commercial property which "exists not only with respect to traditional police searches conducted for the gathering of criminal evidence but also with respect to administrative inspections designed to enforce regulatory statutes." New York vs. Burger, 482 U.S. 691, 699 (1987).

The important issue for this court is whether the private insurance investigators are agents of the State of Connecticut. The state wants this court to apply the tests used by the U.S. Court of Appeals, Seventh Circuit in the

case of U.S. v. McAllister, in which the court citing U.S. v. Attson, 900 F2d. 1427, 1432 (9th Cir.1990) which stated:

> The intent test described in Walther and further refined and applied in [United States v. Howard, 752 F.2d 220, 227 (6th Cir.) cert. denied, 472 U.S. 1029, 105 S.Ct. 3506, 87 L.Ed.2d 636 (185)] thus recognizes that a party is subject to the fourth amendment only when he or she has formed the necessary intent to assist in the government's investigative or administrative functions; in other words, when he or she intends to engage in a search or seizure. However, under this test, the fourth amendment will not apply when the private party was acting for a reason that is independent of such a governmental purpose.
>
> Attson, 900 F.2d at 1432-33 (emphasis added).

If this court applies the Attson standard the private investigators testimony and reports are clearly rendered not on behalf of the government and there is no intent on behalf of the investigators to engage in a search or seizure. In State v. Zarick, 227 Conn.207, (1993) our Supreme

Court ruled on what action is necessary to be an agent of the State. In examining the factual basis of the trial courts decision the Supreme Court made the following findings:

> The determination of whether Guardian was acting as an agent of the state is a question of fact to be determined by the trial court. In this instance, the trial court found that there was no evidence that Guardian was an agent of the state. The evidence supporting the trial court's finding includes the facts that: (1) the policy of turning over questionable photographs to the police was initiated by Guardian; (2) the decision to turn over specific photographs was entirely up to a Guardian manager; (3) there was no supervision or random checking of Guardian by the police in connection with this policy; and (4) there were no instructions or rules regarding such policy promulgated by the police.

Applying the standards of Zarick, this court finds that the policy of turning over the insurance reports is statutorily authorized and that the insurance company is mandatorily required to turn the reports over; that it is logical that the State Police would want to see the reports

rendered by the private investigators and would monitor whether there were investigators on the scene and would professionally request the reports to round out their own investigation; and that Conn. Gen. Stat. §38a-318 is a statute legislatively enacted with its intended consequences.

Based upon the Zarick opinion it is this courts finding that the private investigators are agents of the State of Connecticut and as such their entry onto the defendant,s business premise without his consent constituted an illegal search under the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Connecticut Constitution.

In suppressing the evidence of the investigators this court limits the scope of the suppression to any/all testimony, photographs, tests and/or video's of the defendants premises. All photographs, or video's or tests

of the exterior of the mall or general areas such as roof and the other business premises are not suppressed. All conclusions of the investigators as to cause and origin of the fire that are based upon information, photographs, video's or tests from the business premises of the defendant are suppressed. This courts ruling does not address the separate issue of whether the testimony of the four private investigators, if called by the state, is cumulative and/or prejudicial to the defendants.

/s/ _____, J.
Norko